No. 74-1550

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In the Supreme Court of the United States

OCTOBER TERM, 1975

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 513 F.2d 1142. The first report and order of the Federal Communications Commission (Pet. App. 48a-188a) is reported at 29 F.C.C. 2d 870. The memorandum opinion and order of the Commission denying reconsideration (Pet. App. 189a-194a) is reported at 31 F.C.C. 2d 1106.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1975. A petition for rehearing was denied on March 11, 1975 (Pet. App. 47a). The petition for a writ of certiorari was filed on June 9, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission properly adopted a policy favoring the entry of new specialized communications carriers.

2. Whether the Commission's initiation of an Economic Inquiry (concerning customer interconnection services) precludes it from adhering to its ruling in this case.

3. Whether the court of appeals correctly exercised its discretion, in light of the particular circumstances of this case, not to review petitioner's assertion that the Commission did not comply with the National Environmental Policy Act.

STATUTES INVOLVED

Relevant sections of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, are set forth at Pet App. 195a-209a. Section 405 of the Communications Act (47 U.S.C. 405) is reproduced in the Appendix to this brief.

STATEMENT

Communications companies in the United States provide both public and private lines. Private line service, which is involved in this case, usually is sold to large users of communications. Until 1969 most interstate private line service had been provided by American Telephone & Telegraph Co. (AT&T) (Pet. App. 136a, n. 36).

In 1969, after a hearing lasting several years, the Commission authorized Microwave Communications, Inc., to provide point-to-point private line services between Chicago and St. Louis. *Microwave Communications, Inc.*, 18 F.C.C. 2d 953. The Commission's decision to grant this private line application led to an influx of applications for authority to provide a variety of inter-

state private line services: approximately 40 applications were filed, collectively seeking more than 1,700 licenses to operate microwave communications facilities. The applications raised many issues in common, and the Commission initiated a general rulemaking proceeding (Docket 18920) to explore them. Interested parties were invited to comment on the question whether additional competition for private line service would serve the public interest.

After lengthy proceedings[1] the Commission concluded that the private line service offered by existing carriers had not been sufficiently diversified or flexible, although such service was needed to meet the nation's growing and varied communications requirements (Pet. App. 121a-130a). The Commission also found that new entrants could reasonably be expected to innovate, enlarge markets, and better serve particularized customer needs (Pet. App. 127a-130a). The Commission recognized that competition and new entrants might not be an unmixed blessing; it analyzed the impact of new entrants upon the existing carriers and it determined that, in light of the projected rate of growth of basic services to be provided by AT&T and the likelihood that AT&T would retain a sizeable portion of the specialized services market, a liberalized entry policy would not significantly harm it (Pet. App. 130a-134a). Accordingly, the Commission concluded that a general policy in favor of the entry of new specialized communications carriers was in the public interest (Pet. App. 148a).

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[1]More than 200 parties participated in Docket 18920, building a record exceeding 4,000 pages of pleadings, exhibits and transcripts.

Petitioner sought reconsideration of the Commission's order. The Commission reaffirmed that "there is substantial evidence of a rapidly growing market for new and diversified communication services to meet the changing and expanding communications requirements of the public" (Pet. App. 191a) and that "any potential adverse effects of such new entry on the existing carriers and their customers would be minimal, if any at all" (*id.* at 192a).

On petition for review, the court of appeals unanimously affirmed the Commission. The court held that the Commission acted within its authority in adopting by rulemaking a general policy favoring entry of new carriers (Pet. App. 28a). It ruled that the Commission's decision was a conscientious application of the principles set forth by this Court in *Federal Communications Commission* v. *RCA Communications, Inc.*, 346 U.S. 86 (Pet. App. 25a). Finally, the court declined to review petitioner's claim (not raised before the agency) that the Commission had neglected its duties under the National Environmental Policy Act (Pet. App. 40a-41a).

ARGUMENT

The decision of the court of appeals is correct. It represents only the application to the facts of this case of legal questions settled by *RCA Communications*. There is no conflict among the circuits, or with any decision of this Court, and there is no reason for further review.[2]

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[2]This Court has denied certiorari in a case involving a collateral attack on the Commission's decision involved here. *American Telephone and Telegraph Co.* v. *Federal Communications Commission*, No. 74-1229, decided June 16, 1975. The petitioner in that case has requested a rehearing based upon the pendency of the petition for certiorari in this case, claiming that certain issues are common to both cases. While both cases grow out of the same Commission order, the legal issues in this case are distinct from those in No. 74-1229.

1. The Commission has adopted a policy allowing relatively (although not completely) free entry into the business of providing certain specialized communications services over microwave facilities. Nothing in the Communications Act requires a contrary result. Congress has instructed the Commission to allow new service if it will serve the "public interest, convenience, and necessity." See 47 U.S.C. 309(a) and 214(a). In *RCA Communications* this Court held that the benefits produced by increased competition could satisfy the statutory standard and justify new entry, provided that the Commission "at least warrant, as it were, that competition would serve some beneficial purpose." 346 U.S. at 97. The Commission here has carefully articulated both the feasibility of competition and the specific benefits reasonably to be expected from its new policy (Pet. App. 122a-130a). It has balanced these benefits against the foreseeable costs. As the court of appeals held, this appraisal "sought conscientiously to follow" the guidelines established by this Court (Pet. App. 25a).

Petitioner does not contend that the Commission has failed to meet the standards of *RCA Communications*. Petitioner asserts instead that the Commission's decision is contrary to *Federal Power Commission* v. *Texaco, Inc.*, 417 U.S. 380. But *Texaco*, which dealt with two rate regulation provisions of the Natural Gas Act (15 U.S.C. 717c and d), has nothing to do with policies regarding entry into a business—and certainly not one under a different statute with different language and a different legislative history. *Texaco* does not mention, let alone call into question, the decision in *RCA Communications*.

It is true, as petitioner emphasizes, that in *Texaco* the Court noted that Congress was concerned that concentrated ownership of natural gas pipelines and production facilities had distorted market forces and did not want

market-place prices to be the final measure of "just and reasonable" natural gas rates (417 U.S. at 398). However, to the extent this dictum is relevant at all to the Federal Communications Commission's decision to allow new entrants in private line communications, it supports the Commission's decision: it points to the dangers of excessive concentration, which the Commission's new entry policy works to diminish.

2. Petitioner's contention that subsequent Commission action is "diametrically at odds" with its decision here (Pet. 22), and that the difference should have led the court of appeals to a different conclusion, is inaccurate. The present decision, like several others made since 1968,[3] opened certain segments of the telecommunications market to competition. When making such decisions the Commission necessarily relied on a measure of expert prediction of results and an informed judgment of their costs and benefits. *RCA Communications, Inc., supra,* 346 U.S. at 96-97. The ultimate test of any prediction, however, is experience. The Commission seeks to profit from experience, and periodically attempts to assess the effects of its decisions and reevaluate its policies. And so here: in 1974, in order to determine the actual impact of its several decisions involving competition in telecommunications, the Commission opened a general inquiry. *Economic Inquiry,* 46 F.C.C. 2d 214 (Docket 20003). One of the issues to be examined in Docket 20003 is the claim of petitioner, made in Docket 18920 and renewed by it in Docket 20003, that competition in specialized interstate services will lead to higher local telephone rates. *First Supplemental Notice,* Docket 20003, at pp. 2, A-1 (December 5, 1974). However, the Commission's interest in this issue, like its interest in the numerous other issues to be explored in Docket

[3]See, *e.g., Carterfone,* 13 F.C.C. 2d 420, reconsideration denied, 14 F.C.C. 2d 571; *Domestic Communications-Satellites Facilities,* 35 F.C.C. 2d 844.

20003, does not represent a repudiation of its past policy or acceptance of petitioner's assertions. It is simply a "fact-finding inquiry" in which the Commission is "not proposing * * * to adopt any rules or policies, as such." *Economic Inquiry,* 46 F.C.C. 2d 214-215. It is part of the continuing process by which the Commission broadens its experience and knowledge; its existence is not a ground upon which to attack the Commission's prior decisions. Cf. *Far East Conference* v. *United States,* 342 U.S. 570, 575.

3. Petitioner's argument (Pet. 23) that the court of appeals abused its discretion by failing to review the National Environmental Policy Act ("NEPA")[4] issues raised by it for the first time before that court is unpersuasive. Petitioner admits that neither it nor any other party raised NEPA issues before the Commission, and it recognizes that in these circumstances the court of appeals had discretion not to hear the belated claim (Pet. 23-24). The court did not abuse its discretion; it recognized the importance of NEPA (Pet. App. 40a) but it also recognized (*ibid.*) that "NEPA was not intended to repeal by implication any other statute" (*United States* v. *SCRAP,* 412 U.S. 669, 694), including statutes requiring parties to raise claims before administrative agencies in the first instance. Section 405 of the Communications Act, 47 U.S.C. 405 (Appendix, *infra*) codifies the fundamental administrative law doctrine of exhaustion of administrative remedies. *Neckritz* v. *Federal Communications Commission,* 446 F.2d 501 (C.A. 9).

The court's handling of this matter reveals sensitivity to the values of each statute. The court made it clear that NEPA would apply to the Commission's authorization of construction of private line facilities—not just individually, but "as a whole, and in full

[4]42 U.S.C. 4321 *et seq.*

context" (Pet. App. 41a). But it noted that, since the Commission's report did not authorize the construction of any specific facilities, petitioner could present its environmental claims when the Commission ruled on actual applications (*ibid.*).[5] The court also examined petitioner's claim of environmental impact from the report and found the claim unpersuasive, for "[t]he immediate effect of the order is upon who will furnish the service, not whether it will be furnished, or how much" (*ibid.*).

Although there was thus little to be gained by reviewing the NEPA issue, there was much to be lost by doing so. Because the NEPA issue had not been raised before the Commission, the court lacked the benefit of the Commission's views on the applicability of NEPA "in the peculiar substantive and procedural posture of this matter" (Pet. App. 42a).[6] See *Aberdeen & Rockfish Ry.* v. *SCRAP*, No. 73-1966, decided June

[5]Petitioner claims that the Commission subsequently granted numerous applications without considering environmental impact (Pet. 24). However, petitioner does not deny that it was aware of those applications and that it had the right, which it chose not to use, to raise any pertinent environmental objections (Pet. App. 225a-226a). Under the Commission's environmental impact regulations, which have been in effect since January 1975, the Commission will on its own initiative examine the environmental impact of the construction of the type of microwave relay antenna towers used in private line service. See 47 C.F.R. 1.305(a)(2), 39 Fed. Reg. 43844.

[6]Although petitioner asserts that under the Commission's environmental rules "there can be little doubt" that the Commission would consider environmental impact in adopting a report like the present one (Pet. 25), the matter is far from clear. See 39 Fed. Reg. 43836. As the court of appeals pointed out, the Commission's decision here had little, if any, environmental effect because it prescribed neither the number nor the location of any communications facilities.

24, 1975, slip op. 28-33. To resolve the issue now not only would entail "great delay, waste, and expense" (Pet. App. 42a), but also would create a "potential for abuse" by encouraging parties disappointed by agency action to reserve NEPA issues for the reviewing court as a dilatory tactic (*ibid.*). The court's balancing of values was a reasonable exercise of its discretion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. 405, provides:

> After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(d) (1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(d)(1) of this title, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. A petition for rehearing must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying

> a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

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